STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 4, 2008
v	No. 276817 Kalamazoo Circuit Court
MARIA CANDELARIA KELLETT, Defendant-Appellant.	LC No. 06-001545-FC

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right her jury trial convictions for five counts of assault with intent to do great bodily harm, MCL 750.84, operating under the influence of intoxicating liquor causing serious impairment, MCL 257.625(5), failure to stop at the scene of an accident involving serious impairment, MCL 257.617(2), and felonious driving, MCL 257.626c. Defendant was sentenced to concurrent terms of 80 months to 10 years' imprisonment for each of the five counts of assault with intent to do great bodily harm, 17 months to 5 years' imprisonment for operating under the influence of intoxicating liquor causing serious impairment, 17 months to 5 years' imprisonment for the failure to stop at the scene of an accident involving serious impairment, and 1 year to 2 years' imprisonment for the felonious driving conviction with credit for 197 days. We affirm defendant's convictions and sentences, but vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for further consideration of that issue.

The guidelines recommended minimum sentencing range for the assault with the intent to do great bodily harm offenses is 34 months to 67 months' imprisonment. The trial court departed upward 13 months in sentencing defendant to a minimum term of 80 months' imprisonment for each of the five counts. Defendant argues that the trial court did not specifically identify the factors which it considered to be objective and verifiable to support this departure. A court may depart from the properly calculated sentencing guidelines range if it has a substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his

criminal history. *Babcock*, *supra* at 264; *People v Smith*, ___ Mich ___; 754 NW2d 284 (Docket No. 134682, July 31, 2008), slip op at 7, 29.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error; the determination that the factor is objective and verifiable is reviewed de novo as a matter of law; the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *Babcock*, *supra* at 264-265. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id*. at 269; *Smith*, *supra*, slip op at 7. In ascertaining whether a departure is proper, this Court must defer to the trial court's extensive knowledge of the facts of the case and its direct familiarity with the circumstances of the offender. *Babcock*, *supra* at 270.

At sentencing, the prosecutor requested an upward departure from the guidelines, articulating several specific reasons. Subsequently, when the trial court departed from the guidelines, it incorporated by reference the prosecutor's arguments as to why the guidelines did not accurately reflect the seriousness of defendant's conduct and criminal history. Also, the trial court noted defendant's use of a vehicle and the manner in which she acted: defendant made a threat, left the scene, returned with a vehicle, turned the vehicle's headlights off, and drove into a crowd of people. The prosecutor articulated at sentencing several objective and verifiable factors that provided a substantial and compelling reason to depart from the sentencing guidelines. First, prior record variable (PRV) 7, MCL 777.57, is scored 20 points for two or more concurrent convictions. MCL 777.57(1)(a). Defendant had seven concurrent convictions. The sentencing guidelines did not adequately consider the numerous concurrent convictions. The prosecutor noted that offense variable (OV) 1, MCL 777.31, is scored for only one victim touched by a weapon (10 points) although defendant struck two people with her car. Also, the trial court observed that the guidelines do not treat assaults committed with a motor vehicle on the same par as assaults committed with a firearm or harmful biological substance.[1] Here, defendant drove into a crowd, deliberately attempting to hit people. She was not separately assessed points for the several victims. Similarly, OV 3, MCL 777.33, only contemplated the most seriously injured victim and did not account for the fact that defendant's actions resulted in injuries to two other people. Moreover, defendant's OV score was 106 points, far above the 75-point cap.[2] These factors alone support the trial court's departure from the guidelines. Also, the trial court's reasoning, referring to the use of the vehicle and manner in which it was used, was objective and verifiable and keenly grabs the attention of a court. Moreover, the sentencing guidelines did not account for the use of a vehicle as a potentially lethal weapon against numerous people.

[1] Assaults committed with a gun, knife, or a harmful biological substance are scored at least 15 points to a maximum of 25 points. MCL 777.31(1)(a)-(c).

[2] The original guidelines OV score was 126 points. At sentencing, the trial court reduced both OV 17, scored at 10 points, and OV 18, scored at 5 points, to zero. The trial court's successor further modified the OV score by changing OV 4 from zero to 10 points and reducing OV 12 from 25 to 10 points when it heard and denied defendant's motion for resentencing. None of these modifications altered the recommended sentence grid because any OV score over 75 points placed the offense in the highest OV level.

Therefore, although the trial court did not specifically re-state when articulating the sentence the objective and verifiable factors the prosecutor had reiterated, the trial court clearly adopted those factors for justifying an upward departure. These factors were delineated on the record, as was the trial court's additional reasoning for its sentence that primarily related to the egregious nature of the offenses.[3] Based on the record, the trial court provided ample objective and verifiable factors, which are substantial and compelling reasons for an upward departure from the sentencing guidelines. The trial court did not abuse its discretion either in concluding that the guidelines inadequately accounted for the aggravating factors in the case, or in concluding that the 13-month departure was proportionate to the offense and offender. Therefore, defendant is not entitled to resentencing.

Defendant also argues that the trial court's statement at sentencing was insufficient because the trial court failed to state why a sentence within the appropriate sentencing guidelines range would not be proportionate and because the trial court did not justify the particular departure chosen. As our Supreme Court recently explained, "[w]hen departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Smith*, *supra*, slip op at 12. The key test in determining whether a sentence is proportionate is not whether the trial court adhered to the recommended guidelines range, but whether the sentence reflects the seriousness of the offense and the offender. *People v Moorer*, 246 Mich App 680, 685-686; 635 NW2d 47 (2001). Thus, the "principle of proportionality" is the standard by which a particular departure is to be judged. *Smith*, *supra*, slip op at 12-13. In considering whether a sentence is proportionate, "'everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.'" *Id.*, slip op at 13, quoting *Babcock*, *supra* at 263.

Here, the record evidences that the trial court determined that the sentencing guidelines recommended range would not configure a sentence proportionate to the seriousness of defendant's conduct and her criminal history. We must "review the record to ascertain if the court articulated adequate reasons for the departure and to justify the extent of the departure." *Smith*, *supra*, slip op at 23. In this regard, "the trial court must simply explain why the actual departure that it imposed is justified by the substantial and compelling reasons articulated." *Babcock*, *supra* at 260 n 14. "The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review." *Smith*, *supra*, slip op at 28. Our review of the record in light of *Smith* convinces us that the trial court did not abuse its discretion because the sentence imposed fulfills the *Smith* requirements and was within the range of principled outcomes. *Id*. at 7.

Although the trial court did not have the benefit of our Supreme Court's guidance in *Smith*, we find it helpful in reviewing whether the trial court adequately justified the particular sentence it imposed. In *Smith*, the Court held the trial court failed to explain why the substantial and compelling reasons in that case justified a 15-year upward departure, which was twice the highest recommended minimum sentence. *Smith*, *supra*, slip op at 5, 20. The Court opined that

[3] The trial court observed that in its 20 years as a judge, the instant offenses were in the top five or ten most heinous.

in determining whether a departure is proportionate it may be helpful, although not required, to use the applicable sentence guidelines recommendation cell to "anchor a departure." *Id*., slip op at 18-16, n 41. In *Smith*, the recommended sentence cell fell in the middle of the guidelines grid (OV IV – PRV D). Also, the trial court relied on the nature of the offense, not the defendant's criminal history, to justify the departure, and the minimum sentence imposed of 360 months was still far greater than the maximum-minimum sentence (225 months) that an offender having a similar criminal history might receive. *Id*., slip op at 15-17. The *Smith* Court found these factors compelling indicators that the sentence imposed might be disproportionate. *Id*.

In contrast, here, although the trial court also primarily relied on the egregious nature of the offenses to justify its departure, unlike in *Smith*, the cell for the recommended minimum sentence range fell at the highest OV level with defendant's OV score exceeding the maximum points to reach that level. Because defendant's OV score placed her off the sentence guidelines grid for offenders having similar criminal histories, a sentence above the maximum minimum may be proportionate. *Smith, supra*, slip op at 17-18. Moreover, it would be reasonable for one reviewing the diagonal progression in the sentence guidelines grid to extrapolate that if an OV level VII existed, a minimum sentence of 76 months might be within the recommended range of the hypothetical cell. Given that we must accord some deference to the trial court's assessment, *Babcock, supra* at 270, we cannot say that the trial court's determination that the sentence it imposed was more proportionate than one within the guidelines recommended range was outside the range of principled outcomes. *Id*. at 269; *Smith, supra*, slip op at 7.

Defendant next argues that her convictions for both assault with intent to do great bodily harm and failure to stop at the scene of an accident involving serious impairment are inconsistent. The assault offense is a specific intent offense while the failure to stop offense presumes that there was an "accident," and that the conduct was not intended. Defendant maintains that her conduct could not be intentional under the assault statute and unintended under the failure to stop statute. We find that the two verdicts are not inconsistent.

To resolve this issue, this Court must consider the meaning of MCL 257.617, the statute requiring one to stop at the scene of an accident involving serious impairment. We must interpret the word "accident" as used in the statute. Statutory interpretation is a question of law that is reviewed de novo. *People v Mackle*, 241 Mich App 583, 590; 617 NW2d 339 (2000). Because this issue is unpreserved, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must establish that plain error occurred, i.e. that the error was clear and obvious, and affected the outcome of the trial court proceedings. *Id*.

Our Supreme Court in *People v Keskimaki*, 446 Mich 240, 242; 521 NW2d 241 (1994), considered whether the accident exception to the physician-patient privilege contained in MCL 257.625a(9) of the implied consent statute related to an occupied vehicle that was parked but had the engine running. In determining how to interpret the word "accident" as used in that particular statute, the court looked at how this Court in *People v Martinson*, 161 Mich App 55; 409 NW2d 754 (1987) interpreted the word "accident."

> "Where the term accident appears in criminal statutes which forbid leaving the scene of a personal injury accident, courts in other jurisdictions have interpreted accident to include intentional conduct, reasoning that such statutes are not

> concerned with the cause of an accident but are intended to include all automobile collisions." [*Keskimaki, supra* at 251, quoting *Martinson, supra* at 57.]
>
> The *Keskimaki* Court then noted:
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> We believe two points should be extracted from this case. First, that the intent of the actor, though relevant, is not controlling in determining whether an accident has occurred, and secondly, that the term "accident," when modified by "automobile," generally refers to a *collision*. [*Keskimaki, supra* at 251-252 (emphasis in original).]

The Court in *Martinson* specifically examined the definition of accident in the context of leaving the scene of an accident after an intentional assault using a motor vehicle. *Martinson, supra* at 56-57. This Court rejected the same argument defendant now asserts. *Id*. at 57-58. Moreover, this Court's interpretation of the word "accident" was later adopted in *Keskimaki, supra* at 251-252. Defendant was therefore not denied due process of law by being convicted of both leaving the scene of an accident resulting in serious impairment of body function and assault with the intent to do great bodily harm. The verdicts are not inconsistent. Both convictions could have been, and were, premised on defendant's intentional conduct. The word "accident" in MCL 257.617 includes both intentional and unintentional conduct. *Martinson, supra*. There was no plain error affecting defendant's substantial rights. *Carines, supra.*

Defendant's final argument on appeal is that because there is no indication in the record that the trial court considered defendant's ability to pay court-appointed attorney fees, the part of his judgment of sentence requiring payment should be vacated or this Court should remand this case for a hearing on the matter of her ability to pay. "[A] defendant may be required to reimburse the county for the cost of his court-appointed attorney." *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). In *Dunbar*, this Court addressed whether the trial court must assess a defendant's ability to pay before imposing costs:

> The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id.* at 254-255 (citations omitted and emphasis in original).]

Because defendant did not challenge the imposition of court-appointed attorney fees at the time of sentencing, the trial court was not required to make formal findings of fact regarding

defendant's ability to pay. *Id.* Still, the trial court was required to, but did not, specifically indicate on the record whether it had considered defendant's ability to pay. Additionally, the trial court did not refer to the financial and employment sections of the presentence investigation report nor did it mention defendant's future ability to pay. Consequently, we must vacate that portion of the judgment of sentence that orders the repayment of attorney fees and remand this matter to the trial court for reconsideration of defendant's ability to pay. We emphasize, however, that the trial court need not conduct a formal hearing on this matter as it has the discretion to award attorney fees solely based on the record evidence. MCL 769.1k(1)(b)(iii); *Dunbar*, *supra*.

We affirm defendant's convictions and sentences but vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for reconsideration on this issue. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth Gleicher